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Nos. 95-259 & 95-779

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DARLENE WALTERS and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,
v.
METROPOLITAN EDUCATIONAL ENTERPRISES, INC. and LEONARD D. BIEBER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

1. Since 1966, the Equal Employment Opportunity Commission ("EEOC") has read Title VII's definition of employer—a person that "has fifteen or more employees for each working day" for 20 or more weeks in a year—to cover any person that has 15 or more employees "*on the payroll and regularly employed*" during each working day over the prescribed period. The court below, however, read the operative words to require that an employer have 15 or more employees "*physically present at work or on paid leave*" during each working day over the prescribed period. All applicable canons of statutory construction support the Agency's view.

2.a. By its terms, Title VII's employer definition applies to a person that "*has* fifteen or more employees for each working day" for 20 weeks in a year. The ordinary meaning of these words, established by the law of employment relations, is that a person "has" another as an employee continuously between hire and discharge or quit, and not (as the court below would have it) only when the employee is physically present or on paid leave. Not surprisingly then, the lower court's view also leads to anomalies, *e.g.*, not covering all employers with 15 employees who work full-time hours in fewer than all work days in a work week while covering all employers with 15 part-time employees who are scheduled each work day.

b. The lower court's concern that the EEOC's reading of the employer definition would render superfluous the statutory words "for each working day" is unfounded. The Agency's interpretation provides a bright-line rule under which an employee is not counted toward the employer's total unless she is on the payroll for the *entire* work week. The establishment of a bright-line rule of coverage was an important part of Congress' purpose for the employer definition.

c. In three regards, the legislative history of Title VII fully supports the EEOC's reading of the employer definition and nothing in the legislative materials supports the court of appeals' posit:

The employer definition is intended to provide a clear rule of coverage that does not sweep in employers who had more employees than prescribed in the statute for only the smaller part of the *year* (*i.e.*, employers of seasonal work forces). There is no suggestion of a legislative intent to draw finer lines based on an employee's physical presence in the work place for all days or fewer than all days of a work week.

Title VII's employer definition was derived from that of the Unemployment Compensation Act. In 1964, in defining "employer" under the latter Act, the Internal Revenue Service long had considered an employee employed on all days on which she was on the employer's payroll.

Finally, the small business exemption arose out of Congress' solicitude for the intimate, personal ties binding employer and employee in businesses with a small work force. The EEOC's reading of the employer definition respects the point of the small business exemption without unduly undermining Title VII's broad purpose of eliminating employment discrimination; the lower court's reading does not further the former and undermines the latter.

d. This is, moreover, one of the rare cases in which an action of a later Congress throws a "cross light" on the action of an earlier Congress, *see Pipefitters v. United States*, 407 U.S. 355, 412 (1972). The 1993 Congress, in enacting the Family and Medical Leave Act ("FMLA"), modeled its employer definition on Title VII's. And, the 1993 Congress stated in the legislative history that the FMLA employer definition should be interpreted as the EEOC and the majority of courts had interpreted Title VII's employer definition to count to-

wards an employer's total all employees on the payroll. This post-enactment history, in combination with Title VII's own legislative history, confirms the correctness of the EEOC's reading of Title VII's employer definition.

ARGUMENT

1. Title VII of the Civil Rights Act of 1964 defines an employer as a person that "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b).

The Equal Employment Opportunity Commission ("EEOC"), the Agency charged with administering and enforcing Title VII, in its turn, has determined that "[t]he term 'employees for each working day' . . . refers to persons on the payroll and regularly employed, not the number of persons at work on any given day." *First Annual Digest of Legal Interpretations of Title VII of the Civil Rights Act of 1964* 2 (1966) (citing General Counsel Opinion dated May 11, 1966).[1]

The court below disagreed, holding that only a person that has fifteen or more employees "*physically present at work or on paid leave* for each working day of twenty weeks in a year" is a Title VII "employer." *See EEOC v. Metropolitan Education Enterprises, Inc.*, 60 F.3d 1225, 1227 (7th Cir. 1995) (emphasis supplied). Metropolitan Education Enterprises did not, and the court below accordingly dismissed this case for lack of subject matter jurisdiction.

Every relevant statutory interpretation factor points to the conclusion that the EEOC's reading of Title VII could not be more right and the Seventh Circuit's could not be more wrong.

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[1] *See also* EEOC Policy Guidance N-915-052, *Whether part-time employees are employees within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, 3 EEOC Compl. Man. (BNA) N:3311-N:3316 (Apr. 20, 1990) (reprinted in Pet. App. 30a-40a).

2.a. We begin the analysis by returning to the exact words of Title VII's "employer" definition—any person that "*has* fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." Section 2000e(b) (emphasis supplied).

The EEOC reads the critical words—a person that "has . . . [an] employee[]"—to mean a person that hires another person as an employee to work on a regular basis where there has not been a discharge or a quit. On this reading, the term "has" is understood to refer to a continuous relationship that begins with an agreement to do work as an employee and ends with a termination of that agreement; so long as that relationship continues, the first person "has" the second person as an employee on each and every intervening day.

The Seventh Circuit reads the operative statutory words to mean a person that suffers another person to do work as an employee on a particular day or to take paid leave on that day. On this reading, the term "has" is understood to refer to a series of separate, discrete transactions, each consisting of a day on which one person agrees that another person is to do work as an employee or is to be paid as if she did such work—and each severable from non-work days during which the former does *not* have the latter as an employee.

"Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'" *Pioneer Investment Services Corp. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The established set of understandings that determine when a person "has" an employee is provided by the law of employment relations. That law supports the EEOC's determination that regular employment relationships exist continuously between hire and discharge or quit and negates the Seventh Circuit's notion that, between a hire and a

discharge, regular employment relationships exist only in fits and starts.

Most obviously, an employee under contract for a term is deemed to remain in an employment relationship for that term, absent resignation, death, disability, or discharge under the contract. *See, e.g., Eisenberg v. Insurance Co. of North Amer.*, 815 F.2d 1285 (9th Cir. 1987); *see also* Restatement Second Agency §§ 117, 118.[2] The law does not treat the relationship of employment for a term as one which terminates at the end of each employee work day and recommences with her next work day.

The same is true of the relationship of employment at will, in which the employee works only as long as the employer and employee please. The established employment law in this regard was recently set out in an opinion of the Seventh Circuit (overlooked by the panel below) where Judge Posner explained: "Employment at will is not a state of nature but a *continuing contractual relation.*" *McKnight v. General Motors Corp.*, 908 F.2d 104, 109 (7th Cir. 1990) (emphasis supplied), *cert. denied*, 499 U.S. 919 (1991). "A contract for employment at will may end abruptly but it is a real and continuing contract nonetheless, not a series of contracts each a day—or a minute—long." *Id.*

In common parlance, then, whether a person is employed for a term or at-will, the employer "has" that person as an employee so long as a regular employment relationship continues, both on days that the employee is physically present at work and on days that the employee is absent.

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[2] Indeed, when such an employee continues to work after his or her contract expires, it is *presumed* that the contract (*i.e.*, the employment relationship) has been renewed. *See, e.g., Consolidated Bearings Co. v. Ehret-Krohm Corp.*, 913 F.2d 1224 (7th Cir. 1990); *Vogel v. WMATA*, 533 F.2d 13 (D.C. Cir. 1976).

This point is reinforced by the anomalies created by the lower court's peculiar version of the employment relationship. Under that view, *all* members of the class of persons who do business the traditional 5 days a week and who employ 15 or more employees, each of whom works the traditional 5-days-a-week-8-hours-a-day schedule, *are* Title VII "employers." But *only some* members of the following classes of persons employing 15 or more employees, each working on a 40 hour a week basis, are Title VII employers: Persons employing more than 15 full-time employees who work fluctuating compressed work weeks (*e.g.*, four 10-hour days) and persons doing business seven days a week (instead of the traditional five) employing more than 15 full-time employees who work fluctuating 5-day work weeks. In both instances, while the employer gets the benefit of a traditional 15 full-time employee complement, on any given working day less than 15 employees may be present or on paid leave.

By the same token, on the Seventh Circuit's view, *all* persons employing 15 or more part-time employees who work 20 hours a week throughout the employer's five-working-days week would be covered by Title VII, while *only some* persons employing 15 or more part-time employees who work 20 hours a week on a fluctuating schedule would be covered.

In contrast, the EEOC's reading of Title VII's "employer" definition—which rests on the ordinary legal understanding of the employment relation—properly treats all employers with the same number of regular employees on the payroll as the same for Title VII coverage purposes.

b. The court below refused to defer to the EEOC's interpretation of the text of section 2000e(b), in part because that court believed that it "would render the words 'for each working day' superfluous." 60 F.3d at 1227. But that is not so.

Under the EEOC's reading of section 2000e(b), an employer "has" an employee for a working day only if she is on the payroll that day. The result is that an employee who is hired on Tuesday is not on Monday's payroll and is not counted for the week in question; by the same token, an employee who is discharged on Thursday is not on Friday's payroll and is not counted for the week in question.

On the EEOC's reading, then, Title VII's "employer" definition differs significantly from, for example, a provision counting an employee towards the employer's total if she works on "most" working days in a week. The former establishes a particular bright-line rule for determining coverage while the latter does not. And, as we show below, enactment of a bright-line rule of coverage was of critical importance to Congress in 1964.

For all these reasons, the EEOC's reading of the phrase "for each working day" is more than reasonable and therefore is entitled to a deference that it did not receive from the lower court. *See EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988).[3]

c. The legislative history of Title VII buttresses the EEOC's interpretation of section 2000e(b) and undermines that of the lower court.

The House bill, H.R. 7152, defined the term "employer" as a "person engaged in an industry affecting commerce who has 25 or more employees." That bill was taken directly to the floor of the Senate where an 83-day debate ensued. The legislative stalemate was eventually broken by a Senate bipartisan leadership compromise bill making substantial changes in H.R. 7152, including changes to the definition of "employer." The

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[3] "[I]t is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." *Id.*

compromise was embodied in Senate substitute amendment No. 656—the Dirksen-Mansfield amendment—and with few changes, none relevant here, that substitute amendment became Title VII as enacted into law.

During the course of the Senate debate, two issues related to the definition of "employer" were aired. The first concerned the number of employees that would be required to trigger Title VII coverage. The Senate proponents of the House bill—without deviating from their belief that employment discrimination by smaller employers is morally wrong and harmful to the economy[4]—defended the provision exempting employers with fewer than 25 employees on the pragmatic ground that "when [businesses] get above 25, they get into some reasonable degree of gross product in terms of income or output or salaries or goods or services. They also lose most of whatever intimate, personal character they might have had." 110 Cong. Rec. 13088. In contrast, the House bill's opponents sought to press the exemption's logic further:

> [I]n a small business which employes (sic) 30 or 40 persons, the personal relationship is predominant. . . . [W]hen a small businesman who employs 30 or 25 or 26 persons selects an employee, he comes very close to selecting a partner; and when a businessman selects a partner, he comes dangerously close to the situation he faces when he selects a wife. [*Id.* at 13085 (Sen. Cotton).]

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[4] *See, e.g.*, 110 Cong. Rec. 13090 ("such discrimination is wrong[.] [T]here is no division of opinion among us on that point") (Sen. Case); *id.* at 13091 ("[e]very bit of evidence we have in connection with fair employment practice laws indicates that such statutes not only are good law, good morals, and good labor-management practice, but also good economics") (Sen. Humphrey); *id.* at 13088 ("[t]here is considerable evidence to demonstrate that permitting people to be hired on the basis of their qualifications not only helps business, but also improves the total national economy") (Sen. Humphrey).

In the event, the 1964 Civil Rights bill set the exemption number at 25 employees; and, in 1972, Congress amended the definition of employer in Title VII to lower the statutory threshold for coverage to employers of 15 or more employees to further its principal goal of combating employment discrimination.[5]

The second employer definition issue concerned the situation of an employer with a seasonal work force that fluctuates above and below the numerical threshold set by the statute over the year. Senator Dirksen, the Republican minority leader whose support was essential to break the filibuster led by the Southern Democrats, raised this issue in a memorandum he submitted to the Senate proponents of the House bill and introduced into the Congressional Record. Relevant here, Senator Dirksen made the following inquiry:

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[5] *See, e.g.*, S. Rep. No. 92-415, 1st Sess. 8 (Oct. 28, 1971) (stating, in explaining decision to expand coverage, that "[t]he Committee agrees with the Chairman of the EEOC that discrimination should be attacked wherever it exists, and recognizes that small establishments have frequently been the most flagrant violators of equal employment opportunity"); H. Rep. No. 92-238, 1st Sess. 20 (June 2, 1971) ("[t]he committee feels that discrimination in employment is contrary to the national policy and equally invidious whether practiced by small or large employers"). While Congress retained a limited small business exemption out of a continued "concern[] with the impact of additional federal regulations on smaller businessmen," 118 Cong. Rec. 4907 (Sen. Williams, Chief Sponsor of Title VII Amendments in the Senate), the expanded coverage of Title VII—and the correlative shrinkage in the small business exemption—reflects increased emphasis on Title VII's broad purpose of eliminating employment discrimination and decreased emphasis on the countervailing free association rights of small businesses, *see also id.* at 3972 (Sen. Williams) ("the bill broadens its coverage to reach the employers of 15 or more and unions with 15 or more members. I will say that it is a great advance. Ideally, I think, it should apply to all, but we have made that decision, and for only practical reasons have we made it employers of 15 or more and unions with 15 or more members. A man or woman who has been discriminated against has been wronged just as much whether he or she is an employee in a little shop with three or four or one with fifteen or more").

> [A]ssume if you will the operation of a medium-size orchard. For 11 1/2 months of the year the employer has no employees. But during 2 weeks of the year he employs 100 pickers. Is he to be subjected to the provisions of this title? What of summer or winter resort operations where employment is only for 2 or 3 months at the most. Are they to be covered by this title? Certainly we have no clear statement by which an employer can be guided. Is this the way to legislate? [110 Cong. Rec. 7216-17.]

Senator Clark responded that under the bill as then drafted, "[e]mployers whose staffs fluctuate seasonally are covered by the act at times when the number of employees exceeds the minimum figure; they are not covered when it is below the minimum." *Id.* at 7217.

Not surprisingly, the Dirksen-Mansfield substitute amendment responded to Senator Dirksen's concern by adding to the definition of "employer" the language at issue here—"for each working day in each of twenty or more calendar weeks in the curent or preceding calendar year." The office of that language was to preclude Senator Clark's approach whereby employers would move in and out of coverage on a weekly basis and to do so by providing the "clear statement" on coverage that Senator Dirksen sought. Senator Humphrey explained:

> [The amendment] provide[s] needed certainty as to coverage of employers where the number of employees fluctuates above and below the figure requisite to application of the title. Coverage is limited to those employers who employ more than the required minimum number of employees for at least 20 weeks out of the year. [110 Cong. 12722 (Sen. Humphrey).]

And, Senator Dirksen added:

> [W]e undertook to provide for seasonal workers, by taking the language out of the Unemployment Compensation Act, to the effect that the definition of the

> term "employer" would apply to 25 or more who were employees for each working day, in each of twenty or more calendar weeks. [110 Cong. Rec. 13087.][6]

The foregoing teaches three pertinent lessons:

First, the point of the employer definition is to provide a clear rule of coverage, and one that does not sweep into coverage employers who employ more than the statutory number of employees for only the *smaller part of a year*. It was no part of Congress' purpose to draw fine lines based on whether a regular employee is physically present in the workplace each and every day of a particular work week or three days of that week. The congressional materials thus reinforce the canon of construction that calls for reading Title VII's employer definition according to the law's ordinary understanding of the employment relationship.

Second, as Senator Dirksen stated, the "employer" definition of Title VII was derived from the Unemployment Compensation Act. While the path from the unemployment law to Title VII is in many ways a meandering one, at least one link is plain and direct—in 1964, and during the nine years preceding, the Internal Revenue Service, in defining the term "employer" in the Unemployment Insurance Act, considered an employee to be employed on all days of any week that she was on the employer's payroll. Thus, employees who worked full-time hours on fewer than all working days in a week were counted, *see* Revenue Ruling 55-38 (stating that employees who "because of the long daily hours of employment . . . are granted 1 or 2 days of absence each week" are to be counted; "[i]f the employer-employee relationship exists, it is immaterial that the employee performs no physical service for the employer on certain

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[6] *See also* 110 Cong. Rec. 13088 (Sen. Dirksen) (in defining employer, we "put a sensible figure on the bill, and then nailed it down to make a proper exception for seasonal employees").

days of the week"). Also counted were employees who worked part-time hours during fewer than all days of the week, *id.* (stating that "housewives [who] work half days 3 days per week" are to be counted; "[a]n employee who has worked for an employer only 3 days in each week for a number of years is considered to be 'in employment' on the remaining days of the week").

The legislative reference to the Unemployment Compensation Act thus strongly supports the EEOC's reading of section 2000e(b).

Third, and finally, the legislative materials show that Title VII's small business exemption was in large part the product of a congressional solicitude for the intimate, personal ties that bind an employer and its employees in a small business. Congress defined that threshold in terms of the number of employees on the judgment that, as the size of the workforce increases, the potential for, and likelihood of, such intimacy—and hence the corresponding justification for an exemption from Title VII—decreases.

The EEOC's reading of section 2000e(b) respects the point of the small business exemption without unduly undermining the policy interest represented in Title VII's antidiscrimination provisions. Employer-employee intimacy is, in general, a function of the total number of employees working in an enterprise, and not a function of how many employees are physically present on a working day. Indeed, the policy concerns underlying the small business exemption are far less likely to be implicated in the case of an employer with a substantial number of part-time employees. As a general matter, the relationship between an employer and part-time employees is more tenuous and less intimate than its relationship with core employees.

A large reason why employers hire part-time employees—rather than full-time employees—is to *avoid* the commitments associated with the full-time employ-

ment relationship and to secure employee services at a lower cost (lower pay and fewer fringe benefits such as health insurance and pension benefits) than those entailed in hiring a core, full-time worker. Precisely because the employer makes a lesser investment in and commitment to a part-time employee, the intimacy of the association is correspondingly less. *See, e.g.*, duRivage, Virginia L., ed. *New Policies for the Part-Time and Contingent Workforce*, Economic Policy Institute Series 7-8, 10, 21-24, 73, 91-94 (1992).

In sum, Title VII's protective purpose—to eliminate employment discrimination—is compromised by not counting both regular full-time employees and regular part-time employees who work fewer than all working days in a week in determining whether the statutory threshold for employer coverage under Title VII is satisfied. Equally to the point, neither the broad purpose of Title VII nor the limited, countervailing purpose of the small business exemption—to protect legitimate free association interests of small operators—is served by the lower court's reading of the "employer" definition.

c. The foregoing is, we believe, dispositive. But there is an additional weight in the scale on the side of the EEOC's interpretation of section 2000e(b). In narrow circumstances, the Court considers the actions of a later Congress to " 'throw a cross light' " on a legislative act of a previous Congress. *See Pipefitters v. United States*, 407 U.S. 385, 412 (1972).

In *Pipefitters*, the issue was the meaning of the 1947 enactment of section 610 of the Federal Election Campaign Act. In construing that enactment, the Court took into account the 1971 amendment to that provision passed "to codify the court decisions interpreting [and the legislative history explicating] section 610." 407 U.S. at 410. In so doing, the Court stated:

> The consensus that has now been captured in express terms in § 610 cannot, of course, by itself con-

> clusively establish what Congress had in mind in 1947. But it does "throw a cross light" on the earlier enactment that, together with the latter's legislative history, demonstrates beyond doubt the correctness of the parties' common ground interpretation of § 610. [*Id.* at 411-12 (quoting *Michigan Nat. Bank v. Michigan*, 365 U.S. 467, 481 (1961) (quoting L. Hand, J.)).]

Similarly here, Congress recently enacted a statute, the Family and Medical Leave Act ("FMLA"), that tracks Title VII's definition of employer (except that an employer is required to "employ" 50 instead of 15 employees "for each working day" to trigger coverage). The legislative history of the FMLA indicates that Congress intended the provision defining employer to have the meaning that the EEOC and a majority of courts have already given to it in the Title VII context. The Senate Report stated that the FMLA's "employer" definition

> parallels language used in Title VII of the Civil Rights Act of 1964 and is intended to receive the same interpretation. As most courts and the EEOC have interpreted the language, "employs . . . employees for each working day" is intended to mean "employ" in the sense of maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be counted for this purpose." [S. Rep. No. 103-3, 1st Sess. 21-22 (1993).]

The "cross light" that the legislative history of the FMLA sheds on section 2000e(b), "together with the latter's legislative history, demonstrates beyond doubt the correctness" of the EEOC's reading of that provision. *Cf., Pipefitters*, 407 U.S. at 411-12.

CONCLUSION

For the above stated reasons as well as those stated in the Brief for the Equal Employment Opportunity Commission, the decision below should be reversed.

Respectfully submitted,

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